Supreme Court, U.S.
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In The

Supreme Court of the United States

STEVEN B. POLLACK AND
BLUE ECO LEGAL COUNCIL,

Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
COAST GUARD, NAVY, MARINES,
AND DEPARTMENT OF DEFENSE,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, Blue Eco Legal Council, is an environmental group that brought suit alleging the systematic and ongoing discharge of lead bullets from federal facilities into the Great Lakes.

1. Did the circuit court violate Congressional authority by authorizing the district court to substitute its judgment for that of Congress when holding that discharges of pollutants that violate the Clean Water Act and Resource Conservation and Recovery Act but do not cause drinking water quality to exceed certain national standards are not concrete for citizen suit standing?

2. Pursuant to *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892), whether a plaintiff can establish standing for a nuisance action under the public trust doctrine by establishing state citizenship?

3. Did the circuit court violate standards for 12(b)(1) motions by relying on its own understanding of natural lake processes to deny standing at the motion to dismiss stage where respondents offered no facts contradicting petitioners' jurisdictional allegations in its complaint, affidavits, and briefs?

PARTIES TO THE PROCEEDING

The petitioners are Steven B. Pollack and Blue Eco Legal Council. Blue Eco Legal Council is not incorporated and there is no parent or publicly held company having an ownership interest in the organization.

The respondents are the United States Department of Justice; United States Coast Guard; United States Navy; United States Marines; and United States Department of Defense.

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PETITION FOR A WRIT OF CERTIORARI

Steven B. Pollack, on behalf of himself and Blue Eco Legal Council, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-24a) is reported at 577 F.3d 736. The opinion of the district court (App. 25a-35a) is reported at 2008 U.S. Dist. LEXIS 85072 (September 12, 2008).

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2009. A petition for rehearing was denied on October 14, 2009 (App. 36a-37a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION

Art. I, Section 8 of the United States Constitution provides, in relevant part:

> The Congress shall have power . . . To constitute tribunals inferior to the Supreme Court; . . . To make rules for the government and regulation of the land and naval forces; . . . To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Art. III, Section 2, Clause 1 of the United States Constitution provides, in relevant part:

> The judicial power shall extend to all cases, in law and equity, arising under . . . the laws of the United States, . . . ; to controversies to which the United States shall be a party;. . . .

CLEAN WATER ACT

The Clean Water Act ("the CWA"), 33 U.S.C. § 1311, provides in relevant part: "Effluent limitations **(a) Illegality of pollutant discharges except in compliance with law**. Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful."

The citizen suit provision of the CWA, 33 U.S.C. § 1365, provides in relevant part: "**Authorization; jurisdiction** . . . [A]ny citizen may commence a civil action on his own behalf . . . against any person (including (i) the United States, and (ii) any other governmental . . . agency . . .) who is alleged to be in

violation of . . . an effluent standard or limitation under this chapter. . . ."

RESOURCE CONSERVATION RECOVERY ACT

The Resource Conversation Recovery Act ("the RCRA") provides, by definition, 42 U.S.C. § 6903(3) as follows:

> The term 'disposal' means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters;

and

42 U.S.C. § 6903(27): **(27)** "The term 'solid waste' means any garbage, refuse, . . . and other discarded material, including solid . . . material resulting from industrial, commercial, . . . and from community activities."

The citizen suit provision of the RCRA, 42 U.S.C. § 6972, provides in relevant part:

> In general . . . any person may commence a civil action on his own behalf . . . against any person (including (a) the United States, and (b) any other governmental . . . agency . . .) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

> . . . who has contributed or who is contributing to the past or present handling . . . or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

FEDERAL TORT CLAIMS ACT

The Act, 28 U.S.C. § 1346(b) provides, in relevant part:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

ILLINOIS NUISANCE

Under Illinois law, 720 Ill. Comp. Stat. 5/45-5(1), it is a nuisance "[t]o cause or allow . . . any offal, filth, or noisome substance to be collected, deposited, or to remain in any place, to the prejudice of others." Further, it is a public nuisance "[t]o corrupt or render unwholesome or impure the water of a spring, river,

stream, pond, or lake to the injury or prejudice of others." 720 Ill. Comp. Stat. 5/45-5(3).

STATEMENT

The Navy and Marines began discharging lead munitions into Lake Michigan ("the Lake") from the Great Lakes Naval Station in 1918. (Compl. Ex. G). The government appropriated 3,000 acres of the Lake as an impact area for "errant rounds and ricochets." *See* Army Corps Regulation 33 C.F.R. § 204 (1979). In 1986, the Navy transferred the firearms training range to the FBI. Since then, the FBI has used the range to discharge lead bullets into the Lake. (Compl. Ex. G). The range is located in the city of North Chicago, a low-income minority community whose water intake pipe sits within the impact area. (Compl. Ex. J). In addition, other downstream municipalities to the south, including petitioners' community, draw their potable water from intake pipes located in the vicinity of the impact area. (App. 11a).

In 2006, the Coast Guard conducted live fire training exercise on all five Great Lakes in which it discharged lead munitions into the water. (Compl. Ex. A). In 2007, it withdrew its training under that program but reserved its right to do so by denying it had violated any applicable law. (Compl. Ex. C). Petitioners assert that Coast Guard training in various forms persists and lead bullets continue to be

discharged into the Great Lakes. (Pls.' Reply Mot. Prelim. Inj. Exs. 8, 9).

Congress enacted the CWA in 1972 prohibiting the discharge of pollutants into navigable waters, including from federal facilities, without a permit. 33 U.S.C. §§ 1311(a), 1342. None of the federal respondents have a permit to discharge lead pollutants into the nation's waters. (App. 19a).

In 1986, Congress enacted the RCRA prohibiting all facilities, including federal facilities, from discarding waste into the environment. The federal respondents do not plan to recover their discharges of lead at issue in this case and have therefore discarded solid waste pursuant to the statutory definition. 42 U.S.C. §§ 6903(3), (27); Military Munitions Rule, 62 Fed.Reg. 6622, 6632 ("munitions that land off range that are not promptly rendered safe (if necessary) and/or retrieved, are statutory solid wastes under RCRA section 1004(27), potentially subject to RCRA corrective action . . . [A] failure to render safe and retrieve a munition that lands off range would be evidence of an intent to discard the munition.").

Both the CWA and RCRA contain citizen suit provisions purporting to allow any person to file suit against anyone, including the government, for violating any provision of the acts. 33 U.S.C. § 1365; 42 U.S.C. § 6972.

Petitioners gave respondent Coast Guard and the State of Illinois 60 days notice of intent to sue on Nov.

9, 2006 pursuant to 33 U.S.C. § 1365(b) of the CWA. Petitioners gave the remaining respondents and the State of Illinois 60 days notice of intent to sue pursuant to 33 U.S.C. § 1365(b) of the CWA and 90 days notice of intent to sue pursuant to 42 U.S.C. § 6972(b)(2)(A) of the RCRA on Oct. 1, 2007. The State of Illinois failed to initiate any enforcement action during or after these notice periods and respondents failed to come into compliance during or after these notice periods. Petitioners thereafter filed suit on Jan. 14, 2008.

Four days after suit was filed, the FBI closed down the shotgun range on the edge of the bluff (one of the firing ranges in the facility) in which lead shot are discharged toward the Lake, 20 feet away (although it inexplicably refuses to admit the shot ever reached the Lake). (Pls.' Reply, Mot. Prelim. Inj. Ex. 11). The FBI asserted to the district court orally on multiple occasions that no bullets leave the facility because all bullets are captured by a berm. Nevertheless, the FBI shut down the entire range during litigation after petitioners found 40 FBI bullets that had ricocheted offsite onto the beach below and into the park adjacent to the range. (C.A. App. 10-25). The FBI has since built a taller wall between the range and the park and has reopened the facility. According to petitioners' firearms expert, however, it will continue to discharge errant rounds and ricochets into the Lake and the park.

Petitioners supplied affidavits asserting that they use the Lake shoreline and enjoy local wildlife

dependant on the Lake. (C.A. App. 1-9). The government did not depose any Blue Eco member or provide any evidence challenging facts in their affidavits. The district court dismissed petitioners' suit for lack of standing holding their affidavits were too vague. (App. 33a). Further, the district court noted that the measurement for lead at petitioners' municipal water supplier 13 miles downstream from the range is 9.2ppb, below federal standards of 15ppb found in another statute. (App. 30a-31a). Thus, the court held that petitioners' suit lacked standing because of lack of concrete harm. *Id.*

Petitioners seek this Court's review because federal courts have raised the bar for standing higher than what Congress has embraced in the citizen suit provisions of two important federal environmental statutes. The statutes purport to allow suit for any illegal discharge into the environment without regard to the effect on the environment. However, the district court's holding leaves no one with standing to bring suit for these violations based on a test of their effect on the environment. The federal courts thereby fail to allow claims over conduct that Congress expects will be prohibited by the courts. The district and circuit courts have therefore decided an important Constitutional question of standing in a way that conflicts with Congress' Constitutional authority. Petitioners additionally argue that leaving no one with standing contradicts relevant decisions of this Court.

The Seventh Circuit added to the district court's standing hurdle by finding that the Lake does not flow counterclockwise so as to bring the FBI's pollutants toward petitioners' water intake to the south notwithstanding petitioners' argument that the Lake does in fact flow to the south. (App. 11a-12a). Since the respondents presented no evidence contradicting petitioners' assertion, the court acted arbitrarily by finding its own jurisdictional fact on a motion to dismiss, violated the federal rules of civil procedure, denied petitioners' rights granted by Congress, and was wrong as to the fact. (En Banc Pet. for Reh'g 10).

Subsequently, petitioners obtained a 1986 Navy environmental study that had been the subject of a motion to compel and order by the district court to produce but was withheld despite the order except for 19 of 175 pages. (En Banc Pet. for Reh'g 2-4). One of the withheld pages showed that the Navy (and the Department of Justice) was aware that the littoral drift of the Lake is from north to south (also referred to as lake rotation). (*Id.* at 4). Petitioners then filed a petition for rehearing en banc because the Department of Justice ("DOJ") had been asserting legal theories based on claims the Lake does not rotate when it knew such claims to be false. (*Id.* at 6-7). Even with petitioners' evidence of the DOJ's obstruction of justice, the Seventh Circuit denied rehearing. (App. 36a-37a).

Petitioners now seek review because the Seventh Circuit has so far departed from the accepted and

usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

REASONS FOR GRANTING CERTIORARI

I. This Court's Review Is Warranted Because the Lower Courts' Reasoning Leaves No One With Standing

The courts are misusing standing to deny Congress its authority to empower private attorney general enforcement of public welfare environmental laws. The Seventh Circuit violated separation of powers by authorizing the district court to substitute its judgment for that of Congress when holding that discharges of pollutants that violate the CWA and RCRA but do not cause drinking water quality to exceed certain national standards are not concrete for citizen suit standing. (App. 30a-31a).

If federal courts are going to interpret standing in a way that limits the clear language of federal statute and thereby allow the government to continue illegally discharging pollutants into public drinking water sources, it should be based on an explicit holding by this Court and not a circular interpretation of the "Supreme Court's case law on this subject [that] is both unclear in purpose and extraordinarily difficult to reconcile." (App. 15a) (Cudahy, J., concurring).

A. Leaving No One With Standing When Congress Has Authorized Citizens to Sue Leads to Unconstitutional Results

Congress enacted the RCRA and the CWA respectively to prevent the discharge of pollutants offsite from a facility and into navigable waters without a permit. 42 U.S.C. § 6972; 33 U.S.C. § 1311. Congress included federal facilities provisions in both statutes making federal operations comply in the same manner and to the same degree as private facilities. 42 U.S.C. § 6961; 33 U.S.C. § 1323. Congress also enacted citizen suit provisions with clear waivers of sovereign immunity to force compliance against any violation in the absence of federal or state enforcement. 42 U.S.C. § 6972; 33 U.S.C. § 1365.

The district court took up the issue of petitioners' standing on respondents' motion to dismiss. (App. 25a). The standing inquiry is supposed to decide who is the proper party to bring suit. *See Flast v. Cohen*, 392 U.S. 83, 99-100 (1968) ("when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable."). The district court, however, declared the entire issue non-justiciable based on an effects test not embraced by Congress. (App. 30a-31a). It held that there is no concrete harm to support standing because the government's lead bullets discharged into the Lake have not caused petitioners' drinking water to exceed

15ppb for lead, even if the government's discharges violate federal law. *Id.*

The district court's holding not only denies petitioners standing, it leaves no one with standing to bring suit for these violations. North Chicago citizens cannot bring suit even though their drinking water intake sits inside the impact area because North Chicago's drinking water, while containing lead above zero, is below 15ppb. When the present suit was filed, the lead level for North Chicago stood at 11 ppb while its most recent water quality report shows lead at 12.6ppb. The effect of this ruling is to invalidate the citizen suit provision of important federal statutes for discharges that are illegal but do not solely and immediately cause potable water to become undrinkable.

The Safe Drinking Water Act level for lead of 15 ppb is not a safe level as the court asserts but rather a practical regulatory level imposed on water plants. (App. 22a, n.3). The water quality report that the district court relied on even states that the maximum contaminant level goal for lead is zero. (App. 29a). The zero level goal is defined as the level below which there are no known health effects. *Id.* Since the level of lead in petitioners' water supply exceeds zero, there is a concrete effect on petitioners' health.

Congress resolved the question of effects tests by prohibiting discharges without regard to specific effects on water quality. 33 U.S.C. § 1311. It is therefore an unconstitutional abuse of power for the

courts to substitute its judgment and deny Congress its authority to make the laws affecting the public welfare.

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, also known as the CWA, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). This legislation constituted "a major change in the enforcement mechanism of the Federal water pollution control program." *Am. Petroleum Inst. v. Train*, 526 F.2d 1343, 1344 (10th Cir. 1975) (internal quotation marks omitted).

Previously, enforcement of water laws entailed measurement of the quality of receiving waters. *See, e.g.*, Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903. However, water quality measurements led to substantial enforcement problems. *See E.P.A. v. Cal. ex rel. St. Water Resources Control Bd.*, 426 U.S. 200, 202-03 (1976). Using water quality standards to control water pollution was "inadequate in every vital respect." Sen. Rpt. 92-414, at 7 (1971) (reprinted in 1972 U.S.C.C.A.N. 3668, 3674).

The CWA, therefore, shifted the focus of enforcement efforts from water quality standards to direct controls on the discharge of pollutants – *i.e.*, "effluent limitations." *See* 33 U.S.C. § 1311; *Nat. Resources Def. Council, Inc. v. E.P.A.*, 915 F.2d 1314, 1316 (9th Cir. 1990). Previously a plaintiff had to offer proof of actual damage to a body of water to establish a violation. Congress now wanted to directly

control illegal pollution discharges. *See, e.g., U.S. v. Winchester Mun. Utils.*, 944 F.2d 301, 304 (6th Cir. 1991). Enforcement authorities no longer had to "search for a precise link between pollution and water quality" to control pollution. Sen. Rpt. 92-414, at 8 (1971) (reprinted in 1972 U.S.C.C.A.N. at 3675). Rather, they could now prove a violation of the statute if a facility was discharging restricted pollutants into water sources.

The CWA centers on section 301(a). This section provides: "Except as in compliance with this section and [other sections of the Act], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). In section 402 of the Act, Congress established the National Pollutant Discharge Elimination System (NPDES), which authorizes the issuance of permits for the discharge of limited amounts of effluent. *Id.* at § 1342.

Critical to the enforcement of the CWA is the citizen suit provision found in section 505. 33 U.S.C. § 1365. Section 505(a) states that "any citizen may commence a civil action on his own behalf against any person including (i) the United States . . . who is alleged to be in violation of an effluent standard or limitation under this chapter." *Id.* at § 1365(a). An "effluent standard or limitation" is defined to include any term or condition of an approved permit. *See id.* at § 1365(f). Citizens may bring suit against any NPDES permit holder for violating its permit or as in this case against the owner of a facility discharging pollutants without a necessary permit.

Section 505(g) sets forth the statutory standing requirement for the citizen suit provision of the CWA. *Id.* at § 1365(g). Specifically, it defines "citizen" as "a person or persons having an interest which is or may be adversely affected." *Id.* Congress has indicated that this provision confers standing to enforce the CWA to the full extent allowed by the Constitution. *See Middlesex Co. Sewerage Auth. v. Natl. Sea Clammers Assn.*, 453 U.S. 1, 16 (1981) (citing Sen. Conf. Rpt. 92-1236, at 146 (1972) (reprinted in 1972 U.S.C.C.A.N. 3776, 3823).

The CWA prohibits discharges without regard to the effect on water and sediment quality. In light of clear Congressional intent on this matter, courts should not be allowed to import an alternate standard such as the Safe Drinking Water Act standard to deny standing to citizen suits. Doing so infringes on Congressional authority to make the laws.

If the courts have some philosophical aversion to citizen suit enforcement of what is normally a law enforcement function of the Executive branch of government, *see Friends of the Earth, Inc. v. Laidlaw Env'l Servs. (TOC), Inc.*, 528 U.S. 167, 209-10 (2000) (Scalia and Thomas, JJ., dissenting), then it needs to explicitly state a Constitutional basis for disallowing such suits. Absent that, it is tyranny for the courts to find clever ways to frustrate the command of Congress to allow private attorney general enforcement in the absence of Executive enforcement especially, as in this case, where the Attorney General is also the violating party.

Petitioners have asserted a concrete interest in drinking water it reasonably believes is affected by respondents' discharges by showing the types of contaminants being discharged are in their water and need not prove impairment sufficient to shut down its municipal water supplier to support standing.

B. Leaving No One With Standing Contradicts Relevant Rulings of This Court and Other Circuits

Article III of the Constitution limits federal courts to adjudicating only "cases" and "controversies." Proof of standing ensures that a plaintiff has a minimum personal stake in the dispute. *See Allen v. Wright*, 468 U.S. 737, 750-51 (1984). The standing requirement also "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Ams. United for Separation of Church and St., Inc.*, 454 U.S. 464, 472 (1982).

To achieve the constitutional minimum for standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). These requirements ensure that the judiciary is the appropriate

forum in which to address a plaintiff's complaint. *See Allen*, 468 U.S. at 752.

Standing in environmental cases must be analyzed in the context in which the suit is brought. Sometimes, environmental injury can be viewed as a traditional trespass on property or tortious injury to a person. In other cases, however, the harm can be to an individual's aesthetic or recreational interests. The Supreme Court has clearly stated that these latter interests may also be vindicated in the federal courts. *See, e.g., Laidlaw,* 528 U.S. at 183 (effect on "recreational, aesthetic, and economic interests" is cognizable injury for purposes of standing); *Lujan*, 504 U.S. at 562-63 (purely aesthetic interest is cognizable for purposes of standing); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society . . . deserving of legal protection through the judicial process."). Because these noneconomic interests are shared by the community at large, this Court has cautioned that environmental plaintiffs must themselves be "among the injured" so that Article III case or controversy requirements are not reduced to a formality. *Morton*, 405 U.S. at 735.

Courts must therefore assess jurisdictional facts "to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen*, 468 U.S. at 752. If the plaintiff's claims are neither abstract nor overly speculative, the

Constitution allows plaintiffs access to federal district court to adjudicate them. *Id.*

In *Laidlaw*, the Court found that several citizen affidavits attesting to reduced use of a waterway out of reasonable fear and concern of pollution "adequately documented injury in fact." 528 U.S. at 181-83. Each of the citizens alleged that he or she would make greater recreational use of some part of the affected waterway were it not for their concern about the harmful effects of the defendant's discharges. *Id.* The Court required no evidence of actual harm to the waterway, noting: "We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Id.* at 183 (quoting *Morton*, 405 U.S. at 735).

Petitioners' complaint and affidavits asserted as much:

> "Blue Eco . . . members include Great Lakes residents whose drinking water supply and natural environment is harmed by Defendants' actions in violation of federal environmental law," Compl. ¶3.
>
> "members of the public whose potable (drinking) water supply is drawn from the Great Lakes," Compl. ¶9.
>
> "I drink water drawn from Lake Michigan and I am concerned that the discharges of lead munitions by the federal defendants

into Lake Michigan is negatively affecting the drinking water supply of Highland Park and other local municipalities I visit that draw their drinking water from Lake Michigan" Pollack & Miller Aff's (C.A. App. 4, 7).

"I use and enjoy the public areas along the Illinois portion of Lake Michigan and I am concerned that the lead munitions discharged by federal defendants that is sitting on open land at Foss Park and the beach below the FBI Range will harm visitors to these public areas who may come into contact with this hazardous material and therefore makes it less likely I will visit these public areas myself or with my children" Pollack & Miller Aff's (C.A. App. 4, 7).

"I enjoy watching the wildlife in the Great Lakes watershed and I am concerned that the lead munitions discharged by federal defendants that are sitting on open land and in shallow water near the FBI Range in North Chicago will harm local shorebirds and waterfowl; and lessens the enjoyment I get observing them migrate between seasons" Pollack & Miller Aff's (C.A. App. 4, 7).

"I enjoy eating freshwater and ocean fish and I am concerned that the lead munitions discharged by the federal defendants into the waters of the United States and onto submerged lands are entering the water

> column and bioaccumulating in the tissue and organs of fish coming into contact with the contaminated water and is therefore lessening my desire to consume fish" Pollack Aff. (C.A. App. 4).

The district court, however, dismissed petitioners' case citing lack of conclusive evidence of actual environmental degradation concerning the following: (1) that "bullets will continue to degrade as long as they remain in the lake"; (2) "the ability of lead to bioaccumulate in tissue and organs"; and (3) "reports or any other evidence that shows lead levels have been on the rise or connects those increases to bullet degradation." (App. 30a-31a). But this Court, as stated, does not require such proof.

The district court then dismissed petitioners' beliefs by resorting to logical fallacies of expanding the area of concern to the ridiculous:

> (1) his enjoyment of avian migration "from the Great Lakes watershed" is lessened by his fear that the birds in that area – which encompasses all five of the Great Lakes and is 750 miles wide, http://epa.gov/greatlakes/basicinfo.html – are being harmed by bullets from North Chicago; (2) he is "less likely" to visit any portion of Illinois' shoreline, which is sixty-one miles long, *see* National Park Service, *Great Lakes Shoreline Recreation Area Survey*, at 1, available at, http://www.nps.gov/history/history/online_books/rec_area_survey/great-lakes/il.htm, because he fears that people who visit that land will be

> harmed by contamination from the range; and (3) he has less desire to eat fish from U.S. waters, a source that presumably includes all bodies of water within or bordering on this country, because he fears that the fish have been in contact with water contaminated by bullets from the range. (Pls.' Reply Supp. Mot. Prelim. Inj., Exs., Pollack Aff. ¶¶ -7.)"

(App. 32a-33a). Moreover, the district court was barking up the wrong tree because respondents had already admitted its pollution will have an ecosystem-wide effect: "Any lead and lead compounds migrating from the site will most likely impact the aquatic ecosystem of Lake Michigan adversely." Navy Assessment (1984) (Pl. Reply, Mot. Prel. Inj. Ex. 4, Dist. Ct. Docket at 55).

Seventh Circuit Judge Cudahy, in his concurrence of petitioners' dismissal says the relevant cases on standing "raise more questions than they answer." *Pollack*, 577 F.3d at 744. Judge Cudahy states:

> What is the "affected area"? How do we determine whether someone's aesthetic or recreational values will be "lessened" other than by their say-so? What counts as a "trifle" sufficient to place someone "among the injured"?
>
> This guidance is particularly difficult to follow where the plaintiff is on the bubble: Pollack does not live in North Chicago, where the drinking water is concededly

> drawn from the "affected area" of the lake, but he doesn't live in East Chicago[1] either, or even as far as Evanston[2]. Is Highland Park, thirteen miles away, close enough to be "among the injured?" (footnotes in original).

Id. (App. 18a).

But just six months prior to the appeal in this case, the Seventh Circuit held that a plaintiff need not prove harm to the environment with absolute certainty to show standing in a Clean Air Act case. *See Sierra Club v. Franklin Co. Power of Ill., LLC*, 546 F.3d 918 (7th Cir. 2008). The Clean Air Act citizen suit provision is nearly identical to the CWA and RCRA. 42 U.S.C. § 7604. In *Franklin*, the Seventh Circuit held that "likely exposure to pollutants is certainly something more than an 'identifiable trifle,' even if the ambient level of air quality does not exceed [certain national limits]." 546 F.3d at 925 (internal quotations omitted) (citing *Lafleur v. Whitman*, 300 F.3d 256, 270-1 (2d Cir. 2002)). It found standing where "the plant will release some pollutants and that [plaintiff] believes these pollutants will ruin her ability to enjoy Rend Lake and taint the surrounding area. And her belief is not so irrational that it can simply be discredited." *Id.* at 927.

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[1] "East Chicago, Indiana is 60 miles south of the gun range by car."

[2] "Evanston, Illinois is 26 miles south of the gun range."

Therefore, it appears that the circuit court is using a different standard for citizen suits against the government than it uses for suits against private facilities. Such a double standard is not consistent with the federal facilities provisions of the CWA and RCRA, which require federal facilities be held to the same standards as private facilities. Accordingly, the Court should review this case because the government is one of the nation's largest operators of facilities, is one of the largest polluters, and must be held accountable by the courts. The E.P.A. is the branch of government responsible for enforcing environmental laws but when it will not take action to stop pollution, a citizen suit by a private citizen is the last resort for enforcement.

Moreover, the DOJ acts as counsel for all federal defendants in environmental suits. If the DOJ can violate the law, then there is little chance it will seek justice in its representational capacity for other federal defendants. This Court must review this case to prohibit federal courts from placing its thumb on the scales of justice on behalf of sympathetic defendants like the federal government.

No other circuit has required additional scientific proof where there was a direct nexus between the claimant and the area of environmental impairment. In *Friends of the Earth, Inc. v. Gaston Copper,* 204 F.3d 149 (4th Cir. 1999) the circuit court found plaintiffs had standing in a case remarkably similar to this one. Plaintiffs owned property four miles

downstream from a mining company that was discharging pollutants into the river. *Gaston Copper*, 204 F.3d at 150-1. The pollutants showed up in plaintiff's lake and they filed suit along with an environmental group. *Id.* at 152-3. The district court dismissed the suit for lack of standing finding that the pollutants had not degraded plaintiff's lake sufficient to show concrete harm. *Id.* Plaintiffs appealed and the circuit panel upheld the dismissal. Plaintiffs then sought en banc review. *Id.*

Ironically, the DOJ filed an amicus brief supporting the environmental group arguing the case was of "substantial importance to the United States" because it "concerns the ability of citizens to establish standing to sue under the Act." (C.A. App. 49). Therefore, "[t]he standard set forth in the panel's opinion would significantly restrict citizens' ability to enforce the environmental laws." *Id.* DOJ argued that direct evidence of environmental harm was not required and a plaintiff could rely on circumstantial evidence of harm. *Id.*

The DOJ went on to argue the citizen groups have standing "on the basis of a member's claim that he or she used a body of water in the general area of the discharge, but without requiring any showing that the member used the precise spot at which the discharge occurred." *Id.* (citing *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988) (Patapsco River); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 556-8 (5th Cir. 1996) (Galveston Bay); *U.S. v. Metro. St. Louis Sewer Dist.*, 883 F.2d 54, 56

(8th Cir. 1989) (Mississippi River); *Friends of the Earth, Inc. v. Consol. Rail Corp.*, 768 F.2d 57, 61 (2d Cir. 1985) (Hudson River)). (C.A. App. 52). It also argued that "[m]any of these cases involve quite large bodies of water; nevertheless, these courts drew the reasonable inference that waterborne pollutants migrate, without demanding scientific proof that they had done so." *Id.*

The en banc court in *Gaston Copper* agreed to overturn the dismissal because the Clean Water Act does not require proof of environmental degradation to any specific degree for purposes of standing. *Gaston Copper*, 204 F.3d at 160-4. Requiring such proof would be inconsistent with Congressional intent for creating the Act. *Id.*

The DOJ has therefore argued opposing positions of the same issue in the Fourth Circuit and now in the Seventh Circuit and has created a circuit split because its positions have been vindicated in both circuits. In contrast to its position in *Gaston Copper*, the DOJ in this case has demanded petitioners prove 1) harm to water quality above 15ppb, 2) migration of pollutants 13 miles downstream, and 3) proof petitioners had visited the exact spot where its facility is discharging. (Def. Mot. Dis., 8-10). Thus, the DOJ has made inconsistent assertions of law to two different circuit courts.

Other circuits have been consistent with the Fourth Circuit and did not require affiants to prove actual degradation or migration pathways. For

example, in *Cedar Point Oil Co.*, the Fifth Circuit found injury in fact for citizens' concern for the water quality in Galveston Bay where "two of the affiants live near Galveston Bay and all of them use the bay for recreational activities." 73 F.3d at 556. It was enough that "the affiants expressed fear that the discharge . . . will impair their enjoyment of these activities because these activities are dependent upon good water quality." *Id.*

In *Consol. Rail Corp.*, the Second Circuit found that two citizen affidavits "quite adequately satisfy the standing threshold." 768 F.2d at 61. A first citizen stated by affidavit that "he passes the Hudson [River] regularly and finds the pollution in the river offensive to [his] aesthetic values." *Id.* (internal quotation marks omitted). A second citizen, a father, "averred that his children swim in the river, his son occasionally fishes in the river and his family has and will continue to picnic along the river." *Id.*

In *Metro. St. Louis Sewer Dist.*, the Eighth Circuit found standing where citizen groups' members state they "visit, cross, and frequently observe" the Mississippi River and "from time to time . . . use these waters for recreational purposes." 883 F.2d at 56.

Even threatened injury to petitioners represents injury in fact. This Court has held that threatened injury, not just actual injury, can serve to satisfy Article III requirements for standing. *See, e.g., Valley Forge*, 454 U.S. at 472; *Gladstone Realtors v. Village*

of Bellwood, 441 U.S. 91, 99 (1979). "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Babbitt v. United Farm Workers Natl. Union*, 442 U.S. 289, 298 (1979) (internal quotation marks omitted). The DOJ argued in its *Gaston Copper* amicus brief that "[s]tanding law does not require that a plaintiff wait until actual injury occurs in order to sue." (C.A. App. 51).

Increased risk therefore represents a cognizable harm. Threatened environmental injury is by nature based on probabilities. *Gaston Copper*, 204 F.3d at 160. The Fifth Circuit, in *Cedar Point Oil Co.*, did not require the plaintiff to provide evidence of actual harm to the waterway. 73 F.3d at 556 ("this injury is couched in terms of future impairment rather than past impairment is of no moment.").

In this case, the federal agencies' violations threaten the waters within the acknowledged range of their discharge. By producing evidence that the FBI is polluting Pollack's upstream water source, Blue Eco has shown an increased risk to its member's downstream uses. (App. 19a). This threatened injury creates injury in fact. District and circuit courts cannot demand that plaintiffs wait until their water supply becomes unproductive and unsanitary or discolors and smells bad before they can summon the protections of the CWA, RCRA, and public nuisance. According to the Fourth Circuit, "[s]uch a novel demand would eliminate the claims of those who are directly threatened but not yet engulfed by an

unlawful discharge." *Gaston Copper*, 204 F.3d at 160. Pollack's knowledge that pollution of the type discharged by federal defendants is in his drinking water shows that his fears are based on more than mere speculation.

In sum, the evidence paints a stark picture: the FBI and Coast Guard have been discharging lead offsite into a source of drinking water without a permit in violation of the CWA, RCRA, and public nuisance. The FBI, Navy, and Marine discharges affect or have the potential to affect the waterway south of the facility and North Chicago's water intake that sits within the impact area. (App. 19a) The local water treatment plants have found the type of chemical discharged by the FBI, namely lead, and federal studies demonstrate the harmful environmental and health impacts of lead. (App. 19a, 30a). When this evidence is viewed in light of the legal threshold for standing, it is clear that the district court erroneously dismissed petitioners' suit and the circuit court erroneously affirmed the dismissal.

II. The District and Circuit Courts Erred by Failing to Address Petitioners' Standing as State Citizens With Property Rights to the Lakebed Pursuant to the Public Trust Doctrine

Petitioners should have standing to enforce their state law nuisance claim, as trust beneficiaries to the lakebed, based on state citizenship and not their

use and enjoyment of the Lake. The Seventh Circuit opinion, by ignoring this argument and relying only on petitioners' use and enjoyment of the Lake, extinguishes property rights to the lakebed pursuant to U.S. and Illinois Supreme Court pronouncements. *See St. of Ill. v. Illinois C. R.R. Co.*, 146 U.S. 387 (1892); *People ex rel. Scott v. Chicago Park Dist.*, 66 Ill.2d 65 (1976).

In *Illinois C. R.R.*, the Illinois Legislature had granted a portion of the lakebed adjacent to Chicago to the Illinois Central Railroad. A subsequent legislature sought to revoke the grant. *Id.* at 439-52. Illinois claimed the original grant should not have been permitted in the first place. *Id.* This Court held the state owned the property but held it in trust for the people of the state under the common law public trust doctrine. *Id.* at 452-56. This public trust prevented the government from alienating the public right to the lands under navigable waters. *Id.*

The State of Illinois affirmed the public trust doctrine and applied it to environmental interests from its original focus on navigation. *Chicago Park Dist.*, 66 Ill.2d at 78-81 ("It is obvious that Lake Michigan is a valuable natural resource belonging to the people of this State in perpetuity.").

Under public nuisance, it is a violation "[t]o cause or allow . . . any offal, filth, or noisome substance to be collected, deposited, or to remain in any place, to the prejudice of others." 720 Ill. Comp. Stat. 5/45-5(1). Further, it is a public nuisance "[t]o corrupt or render

unwholesome or impure the water of a spring, river, stream, pond, or lake to the injury or prejudice of others." 720 Ill. Comp. Stat. 5/45-5(3); *see also People ex rel. Burris v. C.J.R. Processing, Inc.*, 269 Ill. App. 3d 1013, 1019 (1995).

Plaintiffs assert that they are Illinois citizens with an interest in the lakebed because they are trust beneficiaries under the public trust doctrine and the Submerged Lands Act. *See* 43 U.S.C. § 1311(a)(1)-(2). None of the public trust cases declare that only those residents along the Lake who use and enjoy it are beneficiaries. Rather the entire population of the state is declared beneficiaries. *Illinois C. R.R.*, 146 U.S. at 452-56. This means state residents in Springfield, Illinois hundreds of miles away from the Lake are just as entitled to assert that their property rights are prejudiced as are petitioners who live about a mile from the Lake. The courts need look no further for standing in a public nuisance case than if the plaintiff is a state citizen.

The Illinois Supreme Court has stated, "[i]f the public trust doctrine is to have any meaning or vitality at all, the members of the public . . . who are the beneficiaries of that trust, must have the right and standing to enforce it. To tell them that they must wait upon governmental action is often an effectual denial of the right for all time." *Paepcke v. Pub. Bldg. Commn.*, 46 Ill.2d 330, 341 (1970) (overturning *Droste v. Kerner*, 34 Ill.2d 495 (1966) as to public trust standing requirements). Through the public trust doctrine, Pollack and other Illinois Blue

Eco members have standing to bring suit against the federal government for the ongoing discharge and 90-year accumulation of lead onto the lakebed, the trust corpus of which they are beneficiaries.

III. The Court's Review Is Warranted Because Lower Courts Are Determining Jurisdictional Facts on 12(b)(1) Motions to Dismiss Without Sufficient Safeguards for Plaintiffs to Develop and Present Facts

This Court should grant review because lower courts need guidance on how to determine jurisdictional facts on a pretrial motion to dismiss with sufficient safeguards for plaintiffs. *See Gibbs v. Buck*, 307 U.S. 66, 71-72 (1939) ("As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court."). District courts follow various procedures when dealing with a motion to dismiss attacking the factual basis of jurisdiction. *See Alliance for Env'l Renewal Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 87-88 (2d Cir. 2006). For example, district courts have determined jurisdictional facts on a motion supported by affidavits, after holding an evidentiary hearing on the jurisdictional facts, or making preliminary jurisdictional findings subject to revision, etc. *Id.* However, the wide discretion trial courts have can allow dismissal of a case prematurely, particularly when the jurisdictional facts are tied to the merits of the case.

A. The Seventh Circuit Erred by Relying on its Own Knowledge of Natural Processes in the Absence of Facts in the Record Contrary to Petitioners' Jurisdictional Assertions

A plaintiff has to meet different standards as to the manner and degree of evidence at successive stages of litigation. *Lujan,* 504 U.S. at 561. In *Lujan*, this Court has said that although the plaintiff has the ultimate burden to establish jurisdiction, there is a presumption that applies on a motion to dismiss at the pleading stage. *Id.*

> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presume that general allegations embrace those specific facts that are necessary to support the claim." *National Wildlife Federation, supra*, at 889. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial." *Gladstone, supra*, at 115, n. 31.

Id. The scheme of increasing the burden of proof as the litigation progresses is generally consistent with the rules of civil procedure.

In contrast, there is a line of court of appeals cases holding that when there is a factual attack on jurisdiction on a motion to dismiss on 12(b)(1), no presumption of truthfulness attaches to the plaintiff's jurisdictional allegations. *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3rd Cir. 1977) ("no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims."). Thus, under the *Mortensen* line of cases, on a motion to dismiss even in early stages of litigation, the plaintiff must establish the jurisdictional facts without the benefit of the presumption. *See id.*

In contrast to a 12(b)(6) motion or a summary judgment motion where the plaintiff's allegations are viewed in a light most favorable to the plaintiff, a 12(b)(1) motion does not have any procedural safeguards for the plaintiff. *Id.* at 892. Further, when a motion to dismiss arises early in litigation, there is a conflict between the presumption of truthfulness described in *Lujan* and the weighing test applied in the *Mortensen* line of cases. *Lujan*, 504 U.S. at 561; *Mortensen*, 549 F.2d at 891.

Furthermore, when the facts are closely tied to the merits of the case, this approach to a motion to dismiss leaves the plaintiff's case vulnerable to a premature dismissal. *Mortensen*, 549 F.2d at 897-8 (vacating dismissal of plaintiff's Sherman Act case). In *Mortensen*, the court found that dismissing the case at this early stage of litigation was premature

because the jurisdictional facts were in dispute. *Id.* at 897-8 ("It is a combination of the timing of the factual jurisdictional attack, the plaintiff's having the burden of proof, and the court's having a free hand in evaluating jurisdictional evidence that can unfairly preclude Sherman Act plaintiffs from reaching the merits of their cases."); *see also Kerns v. U.S.*, 585 F.3d 187 (4th Cir. 2009) (holding that dismissal of a non-frivolous FTCA claim was inappropriate because an issue is common to both jurisdiction and merits of the claim).

Furthermore, having a liberal approach to standing in which courts do not prematurely dismiss cases is consistent with Congress' purpose for creating the citizen suit provisions. *Cf. Bennett v. Spear*, 520 U.S. 154, 165 (1997) (holding that the citizen-suit provision of the Endangered Species Act must be liberally construed to allow for private enforcement actions). In particular, the citizen suit provision of the CWA was to allow "citizens to abate pollution when the government cannot or will not command compliance." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62 (1987).

In this case, branches of the government are continuing to violate the CWA by discharging lead into Lake Michigan without a permit. One argument put forth by the DOJ is that there are discrete areas of the Lake and petitioners lacked standing because their drinking water supply comes from a different source than the one used by North Chicago where the

lead impact area is in Lake Michigan. (Def. Mot. Dis. 8-9).

In its dismissal, however, the district court accepted for the purpose of the motion to dismiss that the Lake is dynamic but determined that the level of lead in the water is not sufficient to establish "injury in fact." (App. 30a). As argued in the first section, infra at 7, in the guise of determining jurisdictional facts, the court was evaluating the merits of the CWA claim. *See id.*

It was the Seventh Circuit that for the first time determined that Lake Michigan does not rotate counterclockwise so as to bring respondents pollutants towards petitioners' water intake. (App. 11a-12a).

The district court had granted the motion to dismiss before the plaintiff had any meaningful opportunity to develop and present facts as to lake rotation. The government filed its motion to dismiss on April 30, 2008, which cut off limited discovery after just four months of litigation. In particular, the district court did not hold an evidentiary hearing and dismissed plaintiffs' case based on the pleadings, affidavits, and briefs.

The court of appeals erred by finding its own jurisdictional facts to deny standing on a motion to dismiss without any evidentiary support in the record. *See Pollack*, 577 F.3d at 741-2. (App. 21a).

Even though appellate courts can affirm the dismissal for lack of jurisdiction on an independent basis. (App. 6a) (the standard of review for dismissal is de novo) appellate courts are not equipped with fact-finding mechanisms. *See Massachusetts v. E.P.A.*, 415 F.3d 50, 55 (D.C. Cir. 2005), *rev'd Massachusetts v. E.P.A.*, 127 S. Ct. 1438 (2007) (considering whether to refer the standing issue to a special master for a factual determination). As a result, this Court's guidance on the proper method for determining jurisdictional facts will be helpful.

The Seventh Circuit held that petitioners failed to establish that there is a southward littoral drift that could carry the pollutants. *Pollack*, 577 F.3d at 741. (App. 11a-12a). Furthermore, the Seventh Circuit asserted the conditions on the Lake are not as dynamic as air pollution. *Id.* However, as the concurring judge points out, the majority does not have a basis for this assertion. (App. 21a) (Cudahy, J., concurring). In fact, pollution discharged in Milwaukee has been shown to travel 25 miles to injure plaintiffs residing in Illinois. *See Illinois v. Milwaukee*, 599 F.2d 151, 168-9, 176 (7th Cir. 1979) (finding that testimony established that southerly currents are strong enough to carry pathogens from Milwaukee into Illinois in less than four days), *rev'd Illinois v. Milwaukee*, 451 U.S. 304, 332 (1981).

Petitioners had alleged that the bullets discharged into Lake Michigan in North Chicago by defendants would affect their water supply by implying that the Lake is dynamic. (Pls.' Reply, Mot.

Prelim. Inj. 8) (" . . . the permanence of bullets in the underwater environment presents an ongoing and continuous source of degradation to the general water supply.").

The DOJ provided no evidence to support its discrete lake theory, did not depose any members of petitioners' organization to develop facts regarding the reasonableness of their beliefs, and in fact withheld evidence showing it knew the littoral drift in the area is from north to south. (En Banc Pet. for Reh'g 1-3). The DOJ's clever argument was that petitioners failed to prove lake rotation even though it knew it to be true. *See id.* at 2.

The district court did not determine if the pollutants could travel to the plaintiffs' water supply. (App. 30a) (assuming arguendo "that the movement of the lake's water could cause contaminants found Near North Chicago [FBI facility] to migrate to Highland Park [plaintiff's residence]").

As a result, this Court should reverse the decision below and establish that courts' discretion to determine jurisdictional facts does not go so far as to deny standing without support in the record.

B. If This Court Does Not Act, the Respondents Will Benefit from Withholding Evidence Supporting Petitioners' Standing

This Court has supervisory jurisdiction over proceedings in all federal courts to ensure that no party unfairly profits from perjury or obstruction of justice. *See Mesarosh v. U.S.*, 352 U.S. 1, 10-14 (1956) (reversing defendants' convictions and granting a new trial where there was evidence that a defense witness had testified untruthfully in another proceeding). The Court described its supervisory power:

> Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts.[9] If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity. (Footnote omitted in printing.).

Id. at 14. Furthermore, state courts also recognize the need to take action when perjury threatens truth-seeking in judicial proceedings. *See People v. Cornille*, 95 Ill.2d 497, 508, 515 (1983) (holding that defendant is entitled to a new trial based on false testimony offered by the prosecution). This Court has a duty to exercise its supervisory power to remedy a situation

where a party has benefited from obstruction of justice.

In this case, the respondents withheld evidence from the court that would establish there is southward littoral drift in Lake Michigan. (En Banc Pet. for Reh'g 3). Petitioners had made several motions to compel in the district court for a 1986 Navy environmental assessment but respondents refused to turn over the entire 175-page document except for the 19 pages it deemed relevant. *Id.* at 2-3. After the appellate decision, petitioners were able to locate a complete version of this document at U.S. E.P.A. headquarters library. *Id.* at 3, n.1. One of the withheld pages stated the littoral drift in the area is from north to south. *Id.*

Despite this knowledge, respondents had denied at oral argument that they were aware of the southward drift. *Id.* at 2. By denying critical facts that it knows to be true and asserting legal theories in reliance of the truth being withheld, the DOJ has obstructed justice and perpetrated a clever fraud on both petitioners and the courts. If the government knew petitioners' jurisdictional assertion was true that the Lake drifts from the firing range toward petitioners' water supply, then there was no challenge as to that fact under 12(b)(1) for the court to decide. Even so, petitioners' petition for rehearing by panel or en banc was denied. (App. 36a-37a). The Seventh Circuit was not interested in seeing justice prevail or even correcting its own error as to lake rotation and the government was able to retain its win. *Id.*

There is no precedent for a party to be allowed to continue discharging pollutants into water because a plaintiff lacked standing. It is disturbing that the first instance involves the government and the courts are looking the other way despite evidence of obstruction of justice by the government attorneys.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

STEVEN B. POLLACK
Attorney

January 2010

In the
United States Court of Appeals
For the Seventh Circuit

No. 08-3857

STEVEN B. POLLACK AND BLUE ECO LEGAL COUNCIL,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 08-CV-00320-**Ronald A. Guzmán**, *Judge*.

ARGUED MAY 8, 2009 – DECIDED AUGUST 13, 2009

Before CUDAHY, MANION, and TINDER, *Circuit Judges*.

MANION, *Circuit Judge*. The United States government operates a gun range on the shores of Lake Michigan. The plaintiffs brought suit against several governmental agencies, alleging that the discharge of bullets into the lake violates various environmental laws. The district court dismissed the suit for want of jurisdiction after concluding the

plaintiffs lacked constitutional standing. The plaintiffs appeal, and we affirm.

I.

In 1918, the United States Navy and Marine Corps began operating a gun range in North Chicago, Illinois. Over the years, many discharged lead bullets from the range landed in an area of Lake Michigan covering 2,975 acres. The military used the site until 1976 when the Federal Bureau of Investigation ("FBI") leased the range. The FBI bought the site in 1987. At some point the range was improved by adding an earthen berm backstop to prevent bullets from landing in the lake. Despite the berm, some bullets escaped into Lake Michigan and nearby Foss Park.[1]

In addition to this gun range, the government also operated a shotgun range on the site. Pellets from the shotguns landed in Lake Michigan. However, the government no longer operates a shotgun range there. Additionally, in 2006 the United States Coast Guard conducted live-fire exercises from boats on Lake Michigan using lead bullets and bullets from those exercises landed in the water. Lead is a

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[1] After the FBI learned of bullets entering Foss Park, it closed the range in April 2008. The FBI improved the range and undertook further studies to prevent bullets from entering the park. According to a May 11, 2009, letter sent to the court, the FBI intends to reopen the range at the earliest possible date.

toxic substance and, if ingested in sufficient quantities, poses a threat to human health.

Plaintiff Steven Pollack is an attorney who lives in Highland Park, Illinois, thirteen miles south of the range. He is the executive director of plaintiff Blue Eco Legal Council ("Blue Eco"), an environmental group "with an interest in the environmental safety of the Great Lakes watershed," that, among other things, sues private and governmental polluters to enforce environmental laws. Pollack and Blue Eco brought this suit against the United States Department of Justice, the United States Coast Guard, the United States Department of the Navy, the United States Marine Corps, and the United States Department of Defense. The plaintiffs alleged that the deterioration of the lead bullets in the water harmed the environment, in violation of the Clean Water Act, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation, and Liability Act, and state nuisance law. Pollack and Blue Eco sought $55.2 million in damages: $35.2 million to pay a private company to remove bullets from the lake bottom and $20 million in tort damages for public nuisance to fund a "supplemental environmental project" to be administered by environmental groups chosen by the court.

To establish standing, the plaintiffs relied on affidavits submitted by Pollack and another Blue Eco member, Darren Miller, who is also a resident of Highland Park. Pollack's affidavit stated that he

enjoyed watching birds in the Great Lakes watershed, visited public parks along the Lake Michigan shoreline, drank water from Lake Michigan at his home in Highland Park, and ate freshwater and ocean fish. Miller's affidavit was nearly identical to Pollack's.

The defendants moved for dismissal under Federal Rule of Civil Procedure 12(b)(1), arguing that the court lacked subject-matter jurisdiction because Pollack and Blue Eco did not possess constitutional standing to assert their claims. The district court granted the motion, concluding first that Pollack and Miller's concern over drinking water did not provide standing because the drinking water in Highland Park was below the environmental limit on lead pollution allowed by the city government, thereby negating any claim of harm by Pollack and Miller. Moreover, the district court held that their concerns over birds, fish, and wildlife were too general and did not allege any particular or specific harm that had been caused by the bullets. The district court concluded that because Pollack and Miller did not possess standing, Blue Eco did not possess standing on their behalf. Accordingly, the district court dismissed the suit for lack of subject-matter jurisdiction. The plaintiffs appeal.

II.

At issue in this case is Pollack's and Blue Eco's constitutional standing to bring this lawsuit. Under

Article III of the Constitution, federal courts are limited to hearing "Cases" and "Controversies." This provision limits the judicial power "to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Inst.*, ___ U.S. ___, 129 S. Ct. 1142, 1148 (2009). This restriction on the power of the courts "'is founded on concern about the proper – and properly limited – role of the courts in a democratic society.'" *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). Permitting a court to decide a case where the plaintiff does not have standing would "allow[ ] courts to oversee legislative and executive action" and thus "significantly alter the allocation of power . . . away from a democratic form of government." *Id.* at 1149 (quotation omitted).

> In order to show standing,
>
> > a plaintiff must show that he is under threat of suffering "injury in fact" that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.

Id.; *accord Sierra Club v. Franklin County Power of Ill., LLC*, 546 F.3d 918, 925 (7th Cir. 2008). An organization has standing when any of its members has standing, the lawsuit involves interests "germane to the organization's purpose," and neither the claim

asserted nor the relief requested requires an individual to participate in the lawsuit. *Sierra Club*, 546 F.3d at 924. At issue here is (a) whether Pollack has standing; and (b) whether Blue Eco has standing through Pollack or Miller. The plaintiffs bear the burden of proving standing. *Wisconsin Right to Life, Inc. v. Schober*, 366 F.3d 485, 489 (7th Cir. 2004). We review a district court's decision on standing de novo. *Id.*

Several Supreme Court decisions guide our analysis. In *Summers*, several environmental organizations challenged a decision of the United States Forest Service to permit a salvage sale of 238 acres of timber in Sequoia National Forest that had been damaged in a fire, without providing notice, a period for public comment, or an appeal process. 129 S. Ct. at 1147-48. The Forest Service acted according to its own regulations, which permit it to exempt from these requirements salvage sales of timber located on less than 250 acres. *Id.* at 1147. The environmental organizations filed suit to challenge the regulations. *Id.* at 1149. The organizations contended they possessed standing based on their members' "recreational interest in the National Forests." *Id.* at 1149. The government conceded that one member of the organizations had standing to challenge the sale of the 238 acres and the parties settled the claim relating to that particular salvage sale. *Id.* The organizations still asserted the facial challenge to the regulations themselves. The organizations submitted an affidavit of Jim Bensman, who asserted "that he

has visited many National Forests and plans to visit several unnamed National Forests in the future." *Id.* at 1150. *Summers* held that this affidavit was insufficient to provide standing, stating that it failed "to allege that *any* particular timber sale or other project claimed to be unlawfully subject to the regulations will impede a specific and concrete plan of Bensman's to enjoy the National Forests." *Id.* Although Bensman's affidavit did reference particular sales in the Allegheny National Forest, there was no "firm intention" to visit that area. *Id. Summers* stated that "[t]his vague desire to return is insufficient to satisfy the requirement of imminent injury." *Id.* at 1150-51.

Conversely, the Supreme Court found standing to sue in *Friends of the Earth, Inc. v. Laidlaw Environmental Services,* 528 U.S. 167 (2000). In *Laidlaw,* a wastewater treatment plant obtained a state permit to discharge treated water containing known pollutants into a river. *Id.* at 175-76. Three environmental organizations sued, basing their standing on members affected by the pollution. For example, one member stated that she lived two miles from the river and that she had picnicked, walked, watched birds, and waded in the river before the pollution and because of the pollution had since ceased those activities. *Id.* at 182. *Laidlaw* held that this and similar statements "adequately documented injury in fact." *Id.* at 183. *Laidlaw* explained that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and

are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Id.*

On the other hand, the Supreme Court held that environmental plaintiffs did not have standing in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). In *Lujan*, an environmental organization challenged a governmental action that allegedly opened public lands for mining. *Id.* at 879. The affidavit of one member stated:

> My recreational use and aesthetic enjoyment of federal lands, particularly those *in the vicinity* of South Pass-Green Mountain, Wyoming have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department. In particular, the South Pass-Green Mountain area of Wyoming has been opened to the staking of mining claims and oil and gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands.

Id. at 886 (emphasis added). *Lujan* held that standing was not established by "averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action." *Id.* at 889.

In addition to these Supreme Court cases, Pollack directs our attention to our recent decision in

Sierra Club v. Franklin County Power of Ill., in which we held that an environmental organization possessed standing to seek an injunction against a power company that had obtained a state permit to build a coal power plant in southern Illinois. 546 F.3d at 923. The environmental organization claimed standing based on a member who had vacationed every two years since 1987 on a lake three miles from the proposed site. *Id.* at 925. The member stated that she fished, kayaked, camped, and enjoyed the beauty of the lake, and that she would cease her trips if the power plant was built. *Id. Franklin County* held that the member had established injury-in-fact based on her "likely exposure" to pollutants from the coal power plant and the cessation of her vacation trips. *Id.* at 925-26. Moreover, the claimed injury was fairly traceable to the proposed power plant. Although the extent of pollution was unclear, we stated:

> We agree that no one knows the ultimate magnitude of McKasson's injury – for example, we don't know if the particulate matter from the plant will blot out the sky or merely create a thin haze that's not visible to the naked eye, or if the airborne mercury will actually spread 45 miles to poison fish that McKasson currently consumes from a pond near her home (which is another harm she claims she will suffer). We do know, however, that the plant will release some pollutants and that McKasson believes these pollutants will ruin her ability to enjoy Rend Lake and taint the surrounding area.

Id. at 927. Accordingly, we held that the member and thus the plaintiff organization had standing to challenge the building of the power plant.

Pollack also relies heavily on *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000), in which the Fourth Circuit held that two individuals had standing to sue a smelting plant that was dumping pollutants upstream from them. One individual owned a home on the affected water where he fished, swam, and boated. *Id.* at 152-53. Another individual operated a canoeing company on the polluted river. *Id.* at 153. Based on these individuals' standing, *Gaston Copper* held that their organizations had standing to challenge the release of the pollutants. *Id.* at 160.

As noted above, in this case Blue Eco bases its standing on nearly identical affidavits from two of its members, Pollack and Miller. Pollack essentially claims four injuries: (1) that he drinks water drawn from Lake Michigan for Highland Park and "other local municipalities" and the shooting of lead bullets pollutes this water; (2) that he enjoys "watching wildlife in the Great Lakes watershed" and that he "is concerned" about the effect on birds from the shooting; (3) that he enjoys "the public areas along the Illinois portion of Lake Michigan" and he is concerned that people in Foss Park and the adjoining beach will be hurt, thereby making it "less likely that [he] will visit" that park; and (4) that he enjoys "eating freshwater and ocean fish" and he is concerned that bullets fired into the water will

"enter[ ] the water column and bioaccumulat[e] in the tissues and organs of fish," thereby lessening his desire to eat fish.

Pollack's intention to drink water and his fear that his water has been contaminated by lead from bullets does not give rise to standing. He relies on *Franklin County* and *Gaston Copper* to argue that his drinking water taken from Lake Michigan gives him standing. However, this case is materially distinguishable from those because Pollack is not downstream from the alleged pollutants and it is unclear whether their presence affects him. In *Gaston Copper,* the individuals were downstream from the entry point for the pollutants. Here, the ricocheting bullets from the Foss Park site and the shotgun range enter Lake Michigan at North Chicago, Illinois. Highland Park is approximately thirteen miles from North Chicago and draws its water from a different section of Lake Michigan than North Chicago. It is unclear if any pollution from bullets discharged into Lake Michigan will travel the thirteen miles from Foss Park to Highland Park. To clarify this point, Pollack alleges that sediment in the region travels in a counter-clockwise direction, from Foss Park to Highland Park, and cites a report of the Environmental Protection Agency. However, that report does not suggest that such a pattern of movement exists. *See* U.S. Envtl. Prot. Agency & Gov't of Canada, The Great Lakes: An Environmental Atlas and Resource Book, ch. 2, § 4 (3d ed. 1995), *available at* http://www.epa.gov/glnpo/atlas/index.html. Hence, Pollack

has not satisfied his burden of showing that decaying bullets near North Chicago will affect his water supply in Highland Park. Pollack's belief that the bullets affect him is also unlike the air pollution at issue in *Franklin County,* because it is commonly understood that air pollution can travel three miles through the air and different wind conditions could easily blow the pollution onto land at that distance. In contrast, it is not readily apparent that Pollack would be affected by the shooting at issue here.

Taken to its extreme, Pollack's argument would permit any person living on or near Lake Michigan to assert that he has been harmed by the bullets, because the lead could potentially have been carried to every part of the lake. However, *Lujan* makes clear that when a vast environmental area is involved and the pollution affects one discrete area while a plaintiff intends to visit a different discrete area, that plaintiff does not have standing. Similarly, Pollack drinks treated water from one discrete area while the defendants' activities affect a different discrete area. Without some support for the assertion that he will be affected by the drift of polluted sediment or water, Pollack has not shown that he has standing to pursue this lawsuit. Thus, because it is not readily apparent that Pollack would be affected by the discharge of bullets, he does not have standing based on Highland Park's drinking water taken from Lake Michigan.

Similarly, Pollack has failed to connect his desire to eat fish with the bullets in the water. For one, his desire to eat ocean fish is not implicated because

Lake Michigan is not the ocean. Moreover, Pollack never avers that he will eat fish from Lake Michigan itself; instead, he refers generally to "freshwater fish." Hence, Pollack has not even claimed that he will eat fish from the affected region. This statement is unlike *Laidlaw* and *Franklin County,* where the individuals actually used the areas affected by pollution. Indeed, Pollack's averment that he eats freshwater fish from some unnamed source is less suggestive of standing than the statements in *Lujan* and *Summers,* where the individuals at least visited the general region affected by pollution. Accordingly, Pollack's intention to eat freshwater fish from an unspecified source does not provide a basis for standing to sue.

Pollack's desire to view wildlife and to visit local parks may both be considered a claim that he will suffer aesthetic harm from the gun range. While the Supreme Court clearly recognizes that aesthetic harms may give rise to standing, *Summers,* 129 S.Ct. at 1149, *Lujan* and *Summers* demonstrate that a plaintiff must show that he has actual aesthetic interest in the area affected by the pollution. When governmental action affects a discrete natural area, and a plaintiff merely states that he "uses unspecified portions of an immense tract of territory," such averments are insufficient to establish standing. *Lujan,* 497 U.S. at 889. Here, Pollack claims generally that he enjoys watching birds in the "Great Lakes watershed" and visiting public parks "along the Illinois portion of Lake Michigan." However, he

never claims that he visits Foss Park or watches birds in that area.[2] Instead, Pollack claims that he visits parks and watches birds within a vast territory. This claim is similar to the statements in *Lujan* and *Summers*, where the individuals never claimed to have a specific interest in the actual area affected by pollution. *Summers*, 129 S.Ct. at 1150; *Lujan*, 497 U.S. at 886. Pollack fails to demonstrate that his interest in bird-watching along an unspecified portion of the Great Lakes watershed – a region stretching from Minnesota to New York – will be affected by the shooting activities in a confined area of North Chicago. Similarly, the section of Lake Michigan bordering Illinois stretches for approximately 70 miles, and Pollack never specifies where along that shoreline he visits. Accordingly, his generalized statements that he visits the Illinois shoreline of Lake Michigan and watches birds in the Great Lakes watershed do not give rise to standing to challenge the shooting activities at issue here.

In short, Pollack's and Miller's interests are too generalized to give rise to standing. "At bottom [the plaintiffs] appear to seek the simple satisfaction of

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[2] Although Pollack visited Foss Park after he commenced suit, a plaintiff must establish standing at the time suit is filed and cannot manufacture standing afterwards. *Laidlaw*, 528 U.S. at 180 (stating that the court considers whether a plaintiff had standing "at the outset of the litigation"); *Perry v. Village of Arlington Heights*, 186 F.3d 826, 830 (7th Cir. 1999) (stating that "[t]he requirements of standing must be satisfied from the outset").

seeing the [environmental] laws enforced." *Jaramillo v. FCC*, 162 F.3d 675, 677 (D.C. Cir. 1998). However meritorious their case may be, the plaintiffs lacked a constitutional basis to bring this lawsuit.

III.

Because neither Pollack nor Miller has demonstrated that they were concretely affected by the shooting activities they challenge, neither individual has standing to pursue this case. Accordingly, neither Pollack nor Blue Eco has standing. The district court's dismissal of this suit for lack of subject-matter jurisdiction is AFFIRMED.

CUDAHY, Circuit Judge, concurring. This is without question a close case. As the case law laid out by the majority suggests, "injury in fact" can be an elusive phenomenon. Although in the present case an injury is arguably traceable to the deposit of toxic substances in potable water, such phenomena appear and disappear from one case to the next depending on subtle twists in the allegations, turning between the real and the hypothetical. *Compare generally Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (Scalia, J.), *and Summers v. Earth Island Institute*, ___ U.S. ___, 129 S.Ct. 1142 (2009) (Scalia, J.), *with Friends of the Earth v. Laidlaw*, 528 U.S. 167 (2000) (Ginsburg, J.). I write separately to make the point that the Supreme Court's case law on this subject is both unclear in purpose and extraordinarily difficult to

reconcile. Close cases like this one ought to make that point clearly. In particular, where a citizen-suit provision potentially sets the bar for proving the merits lower than the bar for proving standing, it is incumbent upon us to carefully examine why the plaintiff before us either has or has not established "injury in fact." Perhaps more important, this plaintiff's case has procedural flaws not addressed by the majority.

The Clean Water Act includes a citizen-suit provision stating that "any citizen may commence a civil action on his own behalf against any person . . . who is alleged to be in violation of an effluent standard or limitation under this chapter." 33 U.S.C. § 1365(a)(1). An "effluent standard or limitation" is defined to include any term or condition of an approved permit. *See id.*, § 1365(f). Citizens are therefore authorized to bring suit against any NPDES permit holder who has allegedly violated its permit. *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 152 (4th Cir. 2000). The Act also includes a statutory standing requirement, which defines "citizen" as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). Congress has explained that this standing requirement confers standing to its constitutional limits. *See Gaston Copper,* 204 F.3d at 152 (citation omitted). Even so, the broad nature of the citizen-suit provision means that in many cases, like this one, the real test will be proof of standing, not of the merits.

To have standing under the "case or controversy" requirement of Article III of the Constitution, an individual must show an injury in fact that is both concrete and particularized and actual or imminent, not conjectural or hypothetical; that the injury is traceable to the challenged action; and that it is redressable. *Defenders of Wildlife,* 504 U.S. at 560-61; *Sierra Club v. Franklin County Power of Illinois, LLC,* 546 F.3d 918, 925 (7th Cir. 2008) (*Franklin County Power*). "Because these elements 'are not mere pleading requirements but rather an indispensable part of the . . . case, each element must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation.'" *Franklin County Power,* 546 F.3d at 925 (quoting *Defenders of Wildlife,* 504 U.S. at 560-61).

Though the test for showing injury in fact is easy enough to state, it is almost hopelessly confusing to apply. We are told that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Laidlaw,* 528 U.S. at 183 (quoting *Sierra Club v. Morton,* 405 U.S. 727, 735 (1972)). "Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing." *Defenders of Wildlife,* 504 U.S. at 562-63 (citing *Morton,* 405 U.S. at 734). But the injury in fact test requires more than an injury to a cognizable interest. It requires that the plaintiff be

"among the injured." *Id.* Nevertheless, the "'injury-in-fact necessary for standing need not be large, an identifiable trifle will suffice.'" *Franklin County Power,* 546 F.3d at 925 (quoting *LaFleur v. Whitman,* 300 F.3d 256, 270 (2d Cir. 2002)) (further internal quotation marks and citations omitted). These statements raise more questions than they answer. What is the "affected area"? How do we determine whether someone's aesthetic or recreational values will be "lessened" other than by their say-so? What counts as a "trifle" sufficient to place someone "among the injured"?

This guidance is particularly difficult to follow where the plaintiff is on the bubble: Pollack does not live in North Chicago, where the drinking water is concededly drawn from the "affected area" of the lake, but he doesn't live in East Chicago[1] either, or even as far as Evanston.[2] Is Highland Park, thirteen miles away, close enough to be "among the injured"?

The majority recites the relevant case law without really engaging with it in a way that gives an answer to this question. The majority quotes *Franklin County Power* at length, for instance, including the court's explanation that, although "we don't know if the particulate matter from the plant will blot out the sky or merely create a thin haze

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[1] East Chicago, Indiana is 60 miles south of the gun range by car.

[2] Evanston, Illinois is 26 miles south of the gun range.

that's not visible to the naked eye, ... [w]e do know . . . that the plant will release some pollutants and that McKasson believes these pollutants will ruin her ability to enjoy Rend Lake and taint the surrounding area." *Franklin County Power,* 546 F.3d at 927. The same can be said here – we know that the gun range has discharged lead in the lake, and we know that Pollack believes that lead in the lake will ruin his ability to enjoy drinking his water, eating fish and watching waterfowl in the Great Lakes watershed. In fact, this case is arguably an easier case for standing than *Franklin County Power.* There, the power plant in question had yet to be built – the injury was, almost by definition, hypothetical. Here, not only has the firing range admitted to discharging lead into the lake, it has admitted to doing so without a permit over the course of decades. And whatever else can be said about Pollack's injury, it is beyond cavil that lead is a toxic substance that even in very small amounts causes harm when ingested by the human body. The majority appears to depart from *Franklin County Power*'s capacious standard, and to settle on a narrower, more demanding requirement.

This is particularly unfortunate here, where the plaintiffs' case is flawed for procedural reasons that may not require us to revisit *Franklin County Power*'s recent pronouncements on standing. The plaintiffs arguably failed to meet their burden of proof. Pollack correctly argues that he need not show environmental degradation to establish standing for a permit violation under the Clean Water Act. *See Gaston*

Copper, 204 F.3d at 159. "[T]he Supreme Court does not require such proof." *Id. Gaston Copper* explained that, in *Laidlaw,* the Court found that "several citizen affidavits attesting to reduced use of a waterway out of reasonable fear and concern of pollution 'adequately documented injury in fact.'" *Id.* (quoting *Laidlaw,* 528 U.S. at 183). "The Court required no evidence of actual harm to the waterway . . . " *Id.* Nevertheless, because the defendants here have challenged the *factual* basis for the plaintiffs' standing to sue, Pollack was required to present some competent proof of his injuries, and his proof is subject to refutation by the defendants.

On a factual challenge to a plaintiff's standing, "'the district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists.'" *Apex Digital, Inc. v. Sears, Roebuck & Co.,* 572 F.3d 440, AT *3 (7th Cir. 2009) (quoting *Evers v. Astrue,* 536 F.3d 651, 656-57 (7th Cir. 2008)) (further internal quotation marks and citations omitted). Indeed, "'the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.'" *Id.* (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n,* 549 F.2d 884, 891 (3d Cir. 1977)). Again, it is undisputed that the defendants regularly discharged lead bullets into Lake Michigan without a permit and that lead is a toxic chemical that can affect drinking water. The narrow question is

whether Pollack had a "reasonable fear" that *his* drinking water was unsafe.

Pollack presented evidence of the "dynamic nature" of the waters in Lake Michigan, suggesting that the lead in the water next to North Chicago can migrate thirteen miles south to Highland Park. The majority brushes this evidence aside, stating that the EPA report Pollack offered in support does not say what he said it says. The majority asserts that "it is commonly understood that air pollution can travel three miles through the air. . . . [but] it is not readily apparent that Pollack would be affected by the shooting at issue here." *Supra* at 11. The majority goes outside the record and cites no authority for its assertion regarding what is commonly understood about air pollution. Even accepting this assertion, it is also commonly understood (at least among boaters in Lake Michigan) that the currents at the foot of the lake, as distinguished from the larger body of water generally, *do* travel counter-clockwise at least part of the year, and therefore the plaintiffs' logic does not implicate the entire lake or every point on its shoreline. It also misses the mark to take Pollack's argument "to its extreme" and to posit whether someone on the other side of Lake Michigan would have standing here – Pollack is the plaintiff before us, and the facts and circumstances of his case, namely his distance thirteen miles from the source of pollution, are what we must address. Setting all of that aside, the district court *assumed* that Pollack's

assertions regarding the lake's currents were true. It is not for us to find otherwise.[3]

More to the point is the fact that the defendants presented *their own evidence* tending to rebut what little evidence that Pollack did put forth. The defendants showed not only that Highland Park (unlike North Chicago) draws its drinking water from intakes outside the roughly 3,000-acre area presumably affected by the firing range, but also that Highland Park and North Chicago have attributed the small amount of lead in their drinking water to corrosive pipes, not to the firing range at issue here. In this respect, then, our case is unlike *Gaston Copper,* where there was competent evidence that the pollutants in question would travel more than 16 miles downstream, passing through the plaintiff's private lake on the way. Here, Pollack's limited evidence that lead has traveled or will travel south to Highland Park and enter the plaintiff's drinking water was outweighed in the view of the district court by the defendants' evidence of an alternative cause for lead in – the corrosive pipes just mentioned. The district court properly exercised its fact-finding role and concluded that the defendants had rebutted

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[3] The majority also focuses on the fact that the lead level in Highland Park's water is not high enough to violate federal standards. This may be beside the point, given that Pollack was not required to show *any* environmental degradation to satisfy the requirements of standing. *See Gaston Copper,* 204 F.3d at 160. Lead is toxic in any amount, and the administrative limit cited by the majority is a practical rather than an ideal ceiling.

Pollack's evidence of standing. *See Apex Digital, Inc.*, 572 F.3d 440, at *3. This is what really seems to tip the balance in Pollack's case.

Perhaps what we can say here, then, is that the farther the plaintiff is from the "area of injury," the more evidence he generally must put forth to prove that he is "among the injured." Perhaps, however, this case resolves as it does merely because of the procedural turns it took. If the defendants had made a facial challenge rather than a factual challenge to Pollack's standing, or if Pollack had put forth more evidence of lead's likelihood of traveling thirteen miles south from North Chicago, then the complaint may have withstood the motion to dismiss. The caselaw is so unclear, however, that we cannot say more than that.

Pollack's claims regarding aesthetic and recreational injuries are less persuasive and the majority addresses them adequately. Pollack does not allege that he uses the *affected area*. *See Laidlaw*, 528 U.S. at 183 (quoting *Morton*, 405 U.S. at 735). Instead, he says he enjoys watching the wildlife "in the Great Lakes watershed," and that he uses public areas "along the Illinois portion of Lake Michigan," and that he enjoys "eating freshwater and ocean fish." These interests are *far* broader than an interest in the area affected by the firing range, however that area might be defined. As the district court pointed out, and the majority reprises, the Illinois shoreline Pollack claims to use is 61 miles long, and the Great Lakes watershed encompasses all five of the Great

Lakes and is 750 miles wide. Pollack never alleges that he used the beach at Foss Park, adjacent to the range, or any beach near there.

Pollack's averments are thus barely – but only barely – insufficient to establish injury in fact, and unfortunately may impair the salutary significance of *Franklin County Power.*

For these reasons, with some reluctance, I concur.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

STEVEN B. POLLACK and BLUE ECO, LEGAL COUNCIL,	)	
Plaintiffs,	)	**No. 08 C 320**
v.	)	**Judge Ronald A. Guzmán**
UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES COAST GUARD, UNITED STATES NAVY, UNITED STATES MARINE CORPS, and UNITED STATES DEPARTMENT OF DEFENSE,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

(Filed Sep. 12, 2008)

Plaintiffs have sued various departments of the federal government for their alleged violations of the Clean Water Act ("CWA"), 33 U.S.C. § 1365, the Resource Conservation Recovery Act ("RCRA"), 42 U.S.C. § 6972, the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9659 and for damages under the Federal Tort Claims Act, 28 U.S.C. § 1346(b). The case is before the Court on defendants' motion pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1) to

dismiss the second amended complaint for lack of subject matter jurisdiction. For the reasons set forth below, the Court grants the motion.

Facts

Between January 19, and September 12, 2006, the U.S. Coast Guard discharged 62,584 bullets, made primarily of lead, into the Great Lakes during eighteen live-fire training exercises. (Second Am. Compl. ¶ 5.) Lead is listed as a toxic chemical under the Emergency Planning and Community Right-to-Know Act. *See* 42 U.S.C. § 11002; 40 C.F.R. § 372.65. The Coast Guard discharged the bullets into the Great Lakes without a permit under the CWA and has taken no action to retrieve them. (Second Am. Compl. ¶¶ 7, 13.)

On December 18, 2006, the Coast Guard issued a press release saying that it had "withdraw[n] the Notice of Proposed Rulemaking to establish 34 safety zones for live-fire training on the Great Lakes." (*Id.*, Ex. D, Coast Guard Press Release of 12/1/8/06.) The release also said that the Coast Guard would "not conduct live-fire training on the Great Lakes to satisfy non-emergency training requirements unless [it] publish[ed] a rule." (*Id.*)

On March 10, 2007, plaintiffs submitted a Freedom of Information Act request to the Justice Department seeking documents regarding the FBI firearms training that occurs at the Great Lakes Naval Base in North Chicago, Illinois. (*Id.*, Ex. F,

Letter from Pollack to FBI of 3/10/07.) In response, plaintiffs received, among other things, an April 25, 1986 real estate appraisal of the FBI's North Chicago facility, which says that the "property has been used for a firing range since 1918" and uses 2,975 acres of Lake Michigan as "the impact area for overfiring." (*Id.*, Ex. G, Real Estate Appraisal of 4/25/86 at 1-2.) Consequently, the appraisal states, [h]azardous waste contamination, primarily from lead, may pose a threat to ground water and possibly to lake waters." (*Id.* at 1.) Plaintiffs allege that the FBI continues to use the North Chicago firing range and discharges, or allows other agencies to discharge, lead bullets into the lake. (*Id.* ¶ 18.)

Plaintiffs also allege that there are two water intake areas in the range impact area, one of which is for drinking water used by the city of North Chicago. (*Id.* ¶ 21.) The City of North Chicago's Water Quality Report for 2006 shows that two of the water sites it sampled had concentrations of lead in excess of 15 parts per billion ("ppb"), the maximum allowed by law. (*Id.*, Ex. K, 2006 North Chicago Water Quality Report.)

Plaintiffs contend that the government's operation of the North Chicago firing range violates CWA, RCRA, CERCLA and constitutes a public nuisance, and they seek a declaration that defendants have damaged the water and land surrounding the firing range, an order requiring them to stop firing lead bullets into that area and remediate the damage they have caused, and an award of damages.

Discussion

There are two kinds of Rule 12(b)(1) motions: those that attack the sufficiency of the jurisdictional allegations and those that attack the factual basis for jurisdiction. Facial attacks are subject to the same standard as motions pursuant to Rule 12(b)(6) motions; that is, the Court accepts as true all well-pleaded factual allegations of the complaint, drawing all reasonable inferences in plaintiff's favor. *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2002). However, in factual attacks, like this one, "the court is not bound to accept the truth of the allegations in the complaint." *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 685 (7th Cir. 1998). "Rather, the plaintiff has the obligation to establish jurisdiction by competent proof, and the court may properly look to evidence beyond the pleadings in this inquiry." *Id.*

Defendants argue that the Court lacks jurisdiction over the claims asserted in the second amended complaint because neither plaintiff has standing to pursue them. An individual plaintiff has standing to sue if he suffered a particularized injury, *i.e.*, one that affects him "in a personal and individual way," that is fairly traceable to defendants' conduct and can be redressed by a decision in his favor. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 & n.1 (1992). Defendants say Pollack has not satisfied the particularized injury element.

With respect to that element, plaintiffs allege that Pollack "lives several miles south of . . . North Chicago," which obtains its drinking water from the firing range impact area and has recently detected lead in its drinking water. (Second Am. Compl. ¶¶ 9, 21-22.) However, the story told by the evidence plaintiffs submitted is a bit different.

For example, Pollack attests that he lives in Highland Park, about thirteen miles south of the North Chicago water intakes. (*See* Pls.' Reply Supp. Mot. Prelim. Inj. at 8; *id.*, Exs., Pollack Aff. ¶ 3.) Moreover, though Highland Park's water is drawn from Lake Michigan, it uses different intake pipes than those that supply North Chicago. *See* City of Highland Park 2008 Drinking Water Quality Report at 1, available at, http://www.ci.highland-park.il.us/pdf/pw/waterQualityReport.pdf. Further, Highland Park's latest water quality report shows that three of its sampling sites had lead in excess of the federal limit of 15 parts per billion ("ppb"), but the overall lead level in the city's drinking water is below that level. *Id.* at 3.

Plaintiffs do not dispute those facts but point out that North Chicago's water has a higher concentration of lead, 11 ppb, than Highland Park's. (*See* Pls.' Reply Supp. Mot. Prelim. Inj., Exs., Ex. K, 2006 North Chicago Water Quality Report.) Given that fact, and the dynamic nature of the lake's water, *see* U.S. E.P.A & Gov't of Canada, *Great Lakes: Environmental Atlas and Resource Book*, ch. 2, § 4, available at, http://epa.gov/greatlakes/atlas/index.html, plaintiffs

say the risk that the lead found in North Chicago's water will migrate to the intakes for Highland Park is sufficiently concrete to support the injury component of standing.

Assuming, *arguendo,* that the movement of the lake's water could cause contaminants found near North Chicago to migrate to Highland Park, Pollack would have standing only if the evidence showed that the migration has injured him. It does not. On the contrary, the most recent reports for North Chicago and Highland Park show that the lead levels in those cities' drinking water are 11 ppb and 9.2 ppb, respectively, well below the 15 ppb limit set by the government. *See* City of Highland Park 2008 Drinking Water Quality Report, available at, http://www.ci.highland-park.il.us/pdf/pw/waterQualityReport.pdf at 3; (Pls.' Reply Supp. Mot. Prelim. Inj., Exs., Ex. K, 2006 North Chicago Water Quality Report).

Plaintiffs acknowledge that the reported lead levels are within governmental limits, but they say that fact is not dispositive of the injury issue because: (1) the bullets will continue to degrade as long as they remain in the lake; and (2) the lead level readings from North Chicago and Highland Park are "limited in number and do not account for the ability of lead to bioaccumulate in tissue and organs." (Pls.' Reply Supp. Mot. Prelim. Inj. at 8.)

Plaintiffs have not, however, offered evidence that supports those assertions. The 1986 appraisal of the North Chicago site says that it has been used as a

firing range since 1918, and, as a result, the surrounding land and water are contaminated by lead. (Second Am. Compl., Ex. G, Real Estate Appraisal of 4/25/86 at 1-2.) If, as plaintiffs assert, lead bullets continuously degrade when they are in water, then North Chicago and Highland Park's historical drinking water quality reports should show a consistent increase in lead levels. And, perhaps they do. But plaintiffs have not provided those reports or any other evidence that shows lead levels have been on the rise or connects those increases to bullet degradation. Nor have they shown, through affidavits or otherwise, that the water tests done by North Chicago and Highland Park are "limited in number," that lead accumulates in human organs and tissue, or that the 15 ppb lead level established by the government does not account for that accumulation. Absent such evidence, plaintiffs have not demonstrated that Pollack's drinking water has been or is likely to be rendered unsafe by defendants' operation of the North Chicago range.

Alternatively, Pollack says he has been injured because: (1) "the enjoyment [he] get[s] [from] observing" the migration of "shorebirds and water fowl" to and from "the Great Lakes watershed" is "lessen[ed]" by his "concern [] that the lead munitions . . . will harm [the birds]"; (2) he is "less likely" to use the "public areas along the Illinois portion of Lake Michigan" because he fears that "the lead munitions . . . at Foss Park and the beach below the [range] will harm" visitors to those areas; and (3) his

"desire to consume fish" from "the waters of the United States" is decreased because he fears the "fish [are] coming into contact with" water contaminated by bullets from the North Chicago range. (Pls.' Reply Supp. Mot. Prelim. Inj., Exs., Pollack Aff. ¶¶ 5-7.)

There is no question that injury to aesthetic interests, like enjoying wildlife and the natural environment, can be sufficient to confer standing. *See Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). But "injury in fact . . . requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Id.* at 735 (quotation omitted).

Pollack has not made the requisite showing. He does not say that he: (1) watches birds that feed at, nest on or routinely use the land or water near the range and his pursuit is being tarnished by fear that the bullets will harm the birds; (2) has stopped using the land near the range, or uses it less, because of his fears of contamination; or (3) has stopped consuming, or decreased his consumption of, Lake Michigan fish because he fears that the bullets have contaminated it. Instead, he says that: (1) his enjoyment of avian migration "from the Great Lakes watershed" is lessened by his fear that the birds in that area – which encompasses all five of the Great Lakes and is 750 miles wide, http://epa.gov/greatlakes/basicinfo.html – are being harmed by bullets from North Chicago; (2) he is "less likely" to visit any portion of Illinois' shoreline, which is sixty-one miles long, *see* National Park Service, *Great Lakes Shoreline Recreation Area*

Survey, at 1, available at, http://www.nps.gov/history/history/online_books/rec_area_survey/great-lakes/il.htm, because he fears that people who visit that land will be harmed by contamination from the range; and (3) he has less desire to eat fish from U.S. waters, a source that presumably includes all bodies of water within or bordering on this country, because he fears that the fish have been in contact with water contaminated by bullets from the range. (Pls.' Reply Supp. Mot. Prelim. Inj., Exs., Pollack Aff. ¶¶ 5-7.) In other words, Pollack says he has standing to sue because defendants have harmed his general interest in the welfare of the wildlife and environment of the entire Great Lakes, not because their actions have harmed him in any personal or individual way as Article III requires. *See Sierra Club*, 405 U.S. at 735 (allegations that land development in a national park "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations" did not give the Sierra Club standing to contest the development because there was no evidence that its members used the park "in any way that would be significantly affected by the proposed" development). Defendants' motion to dismiss Pollack's claims for lack of subject matter jurisdiction is, therefore, granted.

The result is the same for Blue Eco Legal Council, "an environmental organization with an interest in the environmental safety of the Great Lakes watershed" whose members are "Great Lakes

residents whose drinking water supply and natural environment is harmed by Defendants' actions." (Second Am. Compl. ¶ 3.) Blue Eco has standing if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

Like Pollack, the other members of Blue Eco have standing to sue only if defendants' alleged actions harm or threaten to harm them in some concrete way. Pollack, as Executive Director of Blue Eco, submitted an affidavit that says he and twenty-seven other people are members of the organization. (Pls.' Reply Supp. Prelim. Inj., Exs., Blue Eco Aff. ¶ 7.) As noted above, plaintiffs have not shown that Pollack has standing, and the record is equally barren for the other members of the group.[1] Because plaintiffs have not shown that Blue Eco satisfies the first element of organizational standing, the Court grants defendants' motion to dismiss its claims for lack of subject matter jurisdiction.

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[1] Plaintiffs submitted the affidavit of only one other Blue Eco member, Darren Miller, whose injury assertions are identical to those made by Pollack in paragraphs five and six of his affidavit. (*Compare* Pls.' Reply Supp. Mot. Prelim. Inj., Exs., Pollack Aff. ¶¶ 5-6, *with id.*, Miller Aff. ¶¶ 5-6.)

Conclusion

For the reasons set forth above, the Court grants defendants' motion to dismiss the second amended complaint for lack of subject matter jurisdiction [doc. no. 47], and strikes as moot plaintiffs' motions for a temporary restraining order [doc. no. 27], a preliminary injunction [doc. no. 13] and to expedite the motion for preliminary injunction [doc. no. 28]. This case is terminated.

SO ORDERED.

ENTERED: September 12, 2008

/s/ Ronald A. Guzmán
HON. RONALD A. GUZMAN
United States District Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

October 14, 2009

Before

RICHARD D. CUDAHY, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

JOHN DANIEL TINDER, *Circuit Judge*

No. 08-3857

STEVEN B. POLLACK and BLUE ECO LEGAL COUNCIL,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 08 CV 00320

Ronald A. Guzman, *Judge.*

ORDER

On consideration of the petition for rehearing en banc filed by plaintiffs-appellants, no judge in active service has requested a vote on the petition for rehearing en banc,[1] and all judges on the original

[1] Judge Flaum did not participate in the consideration of this petition for rehearing en banc.

panel have voted to deny rehearing. The petition is therefore **DENIED**.